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NO. 88-347

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

ERIN ANDREW CONN, *Petitioner*,

v.

JENNIFER ANN CONN, *Respondent*.

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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**Cases:**


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Petitioner Erin Andrew Conn (hereinafter the Father) replies to arguments first raised in Respondent's Brief in Opposition, pursuant to Sup. Ct. R. 22.5.

Respondent Jennifer Ann Conn (hereinafter the Mother) concedes the jurisdiction of this Court to hear thise case, Brief in Opposition at 4, but argues that this Court "should decline to exercise jurisdiction" because "the Indiana Supreme Court properly applied dispositive U.S. Supreme Court precedent." *Id.* Mr. Conn need not address the erroneous interpretation of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), employed by the lower court, as this matter has been addressed in his Petition for a Writ of Certiorari. Those cases do not preclude the consideration of Mr. Conn's rights and interests and the issuance of the injunction by the trial court herein.

However, Mr. Conn must reply to the second reason argued by Respondent for declining the exercise of this Court's jurisdiction. The Respondent asserts that "this Court need not even consider Ms. Conn's constitutional rights unless [*Roe v. Wade*] creates for a man an affirmative constitutional right to use the power of the government to interfere with a woman's private and constitutionally protected right to choose to have an abortion." *Id.*[1]

This argument is erroneous. The Father argues three theories in his Petition: (1) that under substantive due process analysis, the state has a compelling interest in protecting the Father's interests in his unborn child; (2) that under the traditional balancing approved by this Court where competing rights collide (e.g., freedom of the press versus the right to a fair trial), the balance, in this case, weighs in his favor; and (3) that under the equal protection and due process clauses of the Fourteenth Amendment and the reserved rights of the Ninth Amendment, the Father has an affirmative right to a judicial consideration of his rights and interests in his child in the context of a dissolution action when his wife proposes to abort the child. Petition for a Writ of Certiorari at 23, 27, 26.

The Wife, however, completely ignores the Father's first theory — substantive due process analysis — in her Brief and procedes on the basis that the abortion right is absolute and that fathers have no protectable interests in their unborn children. Employing substantive due process analysis, a state court may properly conclude that, on the facts of a particular case, the father's interests in his unborn child so far outweigh

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[1] This curious statement by the Wife is based upon her notion that, before birth, there is no father, mother, and child. Brief of Appellant in the Indiana Court of Appeals at 34 ("this case does not involve a child or a father"). Since no child exists herein, in the Wife's view, this case is a dispute between a man and a pregnant woman over abortion. In the Father's view, however, an unborn child exists, *Roe*, 410 U.S. at 165 n. 67 ("father"), 163 ("mother"), 162 ("unborn children"), and, thus, this case is a dispute between a mother and father over their child.

those of his wife in aborting their child that the state has a compelling interest in protecting his interests by enjoining her abortion. The Wife refused to employ the analysis mandated by *Roe*. She fails to demonstrate that substantive due process analysis is inappropriate or that the state, herein, has no compelling interest.

In contrast, the Wife seeks to recast this case as one focusing exclusively on the assertion of fathers' rights, requiring some state action against which the Father may assert his right. She wholly ignores substantive due process analysis and answers the other two theories with an assertion that *Roe* is absolute, fathers have no assertable rights in their unborn children, and an asserted lack of state action. However, this Court need never reach the latter two theories, for, by employing substantive due process analysis, it may find that the state court was not precluded by *Roe* and *Danforth* from considering the interests of Father in his unborn child and from enjoining the abortion of his child, if his interests are compelling. No state action against the Father need be shown in such an analysis.[2]

Indeed, it is urgent that this Court take this case because trial courts have been finding that, in individual cases, some fathers' interests have been compelling and need legal protection; the Mother cites cases where this is true, as in the present case. Brief in Opposition at 16. As she indicates, these findings have been overturned on appeal, based on erroneous interpretations of this Court's decisions in *Roe v. Wade* and *Planned*

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[2] The Wife attempts to invoke the comment of Justice Stevens in his opinion accompanying his denial of an injunction, barring an abortion, in *Doe v. Smith*, 108 S.Ct. 2136 (1988). Justice Stevens expressed "serious doubts" that there could be a federal remedy, because there was *no state action*. In that case, however, the trial court refused to issue an injunction and the Father was asserting, in part, that this constituted a violation of his constitutional rights. In the present case, however, the state court has acted to enjoin the Wife from aborting their unborn child. The Father herein, therefore, is defending this exercise of state power on the basis, in part, that the state court was acting to protect the Father's constitutional rights. Thus, Justice Stevens' remark is inapplicable.

*Parenthood of Central Missouri v. Danforth*. This demonstrates the gravity of the situation.

Every abortion involves a father, some of whom are also husbands, and the "vast majority" of these men are informed of the proposed abortion of their child. Brief in Opposition at 8-9 n. 6. Many of these men wish to assert their interests and rights and many states seem willing to protect these interests, in certain cases, when they are compelling. However, the Indiana Supreme Court in this case (as well as other state courts[3]) has interpreted the rulings of this Court to preclude such action on the erroneous basis that the abortion right is absolute and that there is no interest on the part of a father at all. It is urgent that this matter be resolved by this Court.

In sum, fathers with compelling interests are being deprived of a constitutionally permissible legal remedy by erroneous interpretations of this Court's holdings in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*. As a result, fathers are suffering grievous harm. It is crucial that this Court take this case to resolve the error of the lower courts which have "decided federal questions in a way in conflict with applicable decisions of this Court" and have erroneously "decided an important question of law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c).

Respectfully submitted,

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[3] *See, e.g., Lewis v. Lewis*, now before this Court on a Petition for a Writ of Certiorari to the Michigan Supreme Court, Docket Number 88-683.